

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

EDWARD BRAGGS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	2:14cv601-MHT
	)	(WO)
JEFFERSON S. DUNN, in his	)	
official capacity as	)	
Commissioner of	)	
the Alabama Department of	)	
Corrections, et al.,	)	
	)	
Defendants.	)	

PHASE 2A OPINION AND ORDER ON NEXT STEPS  
FOR A PROCESS TO IDENTIFY FUNCTIONAL SEGREGATION

After an on-the-record hearing on December 6, 2019, this court solicited the views of defense expert Dr. Mary Perrien about how "to determine when a cell or unit is functioning as segregation." *Braggs v. Dunn*, No. 2:14-cv-601, 2019 WL 7041620, at \*2 (M.D. Ala. Dec. 19, 2019) (Thompson, J.). At the time, the court "note[d] several significant methodological disagreements that, as a preliminary matter, would need to be resolved to develop such a process." *Id.* In short, these disagreements were about (1) how

out-of-cell time should be documented; (2) how out-of-cell time should be averaged; and (3) whether certain out-of-cell activities should be excluded from the calculation. See *id.*

Dr. Perrien's proposal (doc. no. 2772-1) clearly addresses two of the three significant methodological disagreements. In short, as to (1), how out-of-cell time should be documented, Dr. Perrien proposes that the Alabama Department of Corrections (ADOC) create a written schedule of planned out-of-cell time in a unit, and have officers document deviations from the schedule; and, as to (2), how out-of-cell time should be averaged, she proposes to determine the average weekly out-of-cell time for the unit over the course of a quarter. A unit providing less than an average of 11 hours per week of out-of-cell time would be determined to be functioning as segregation. Dr. Perrien's proposal does not specifically address (3), whether certain out-of-cell activities should be excluded from the calculation. However, Dr. Perrien previously

explained that she would count any out-of-cell activity, if it were practical to do so. See *Braggs*, 2019 WL 7041620, at \*2 (citing to the suicide-prevention trial).

The court also sought the views of both the plaintiffs and the defendants as to Dr. Perrien's proposal. The plaintiffs agree with the premise of the proposal but ask this court specifically to modify it in part. See, e.g., Pls.' Response (doc. no. 2805) at 2 ("The premise of Dr. Perrien's proposal is that celled housing units should adhere to out-of-cell time schedules to ensure that such units do not function as segregation.... Plaintiffs agree with this concept and find it to be consistent with expert testimony."). As to (1), how out-of-cell time should be documented, the plaintiffs agree with Dr. Perrien's proposal of a weekly schedule of planned out-of-cell activity. However, the plaintiffs request that the documentation specifically include a count of the number of inmates who participate and who refuse to participate in each

activity. As to (2), how out-of-cell time should be averaged, the plaintiffs request that the average weekly out-of-cell time be averaged over a month rather than a quarter. And, as to (3), whether certain out-of-cell activities should be excluded from the calculation, the plaintiffs request that certain activities, such as showers, haircuts, pill calls, sick calls, diabetic finger sticks, vital sign checks, and picking up meal trays not be counted, given the prior testimony of the plaintiff expert Dr. Kathryn Burns.

Beyond the preliminary methodological disagreements, the plaintiffs additionally propose to apply this measurement process to any units that plaintiffs "in good faith believe to be operating as segregation." Pls.' Response (doc. no. 2805) at 9. Further, while Dr. Perrien proposes that any relief provided for units found to be operating as segregation be determined on a unit-by-unit basis by ADOC "with input from the External Compliance Team," Perrien Report (doc. no. 2772-1) at 4 n.2, the plaintiffs

instead "ask the Court to order relief for segregation-like units that is consistent with relief that has already been ordered for officially designated segregation units ... and ... re-assert their request for additional segregation relief that remains pending before the Court." Pls.' Response (doc. no. 2805) at 11.

The defendants view Dr. Perrien's proposal as "an acceptable process in large measure," though they did not comment on its specifics. Defs.' Notice Regarding Proposal (doc. no. 2772) at 7-8 ¶ 8. Nonetheless, the defendants ask this court to deny the plaintiffs' request to extend relief to units that allegedly function as segregation, for reasons which will be discussed later.

The court is cognizant of the fact that the scheduled oral argument on this issue was continued generally. In order to continue moving forward on this issue in the interim, and for the reasons that follow, the court will order limited additional briefing prior

to the oral argument to clarify the pending proposal as it relates to the methodological disagreements discussed above. The court will also deny the defendants' broad request to deny *any* relief to units found to be functioning as segregation, regardless of the specific process for tracking out-of-cell time. The court will address the *extent* of appropriate relief as part of the pending segregation opinion, which will encompass relief for units that are both formally labelled as segregation and found to be functionally operating as segregation.

#### I. DR. PERRIEN'S PROPOSAL AND PLAINTIFFS' RESPONSE

The court will first detail the plaintiffs' requests to adopt in part and modify in part Dr. Perrien's proposal, explaining the views that motivate the order for additional briefing.

A. Documentation of Out-of-Cell Time

In order to calculate the amount of out-of-cell time provided per week, Dr. Perrien has proposed that "ADOC will develop a schedule for all Contested Units with celled housing that provides for at least two (2) hours of out-of-cell activity per inmate per day," or 14 hours of out-of-cell activity per inmate per week. Perrien Report (doc. no. 2772-1) at 2. "At the end of each shift, the unit officer [would] note any deviations from the unit's scheduled activities" by "sign[ing] [the] daily schedule." *Id.* at 2-3 & n.1. Because "[t]he signatures of officers [would] mean that the activity, unless otherwise noted, occurred," *id.* at 2-3 n.1, the documentation would allow ADOC to calculate the "weekly provided out-of-cell time" for each unit as the "sum of [scheduled] activity hours minus program shutdown activity hours." *Id.* at 3. "Program shutdown activity hours" are presumably the hours for which an activity was scheduled but did not occur.

The plaintiffs ask this court to require additionally that the officer "document how many prisoners participated in [each] activity and how many refused," Pls.' Response (doc. no. 2805) at 8, for two distinct reasons. First, the plaintiffs are concerned that not all scheduled activities may be offered to all prisoners in a unit. For example, "in some celled housing units," according to the plaintiffs, "activities like yard are not offered to the entire unit at once but rather to a portion of the unit (also known as a 'tier' or 'side,' depending on the unit)." *Id.* at 7. Second, the plaintiffs are concerned that even if activities are offered to all prisoners in a unit, they may be "offered at times or in manners that discourage participation." *Id.*

While these concerns are valid, the court does not believe that such additional documentation is necessary. As the court has previously noted, any system to identify function segregation must "balance[] the importance of identifying cells or units for which

relief may be appropriate with the goals of creating a manageable, not overly burdensome, and yet objectively verifiable process." *Braggs*, 2019 WL 7041620, at \*2. Dr. Perrien balanced these goals by proposing a system that is focused on the unit-level, however that is defined, rather than the individual-level. The court is unwilling to upset that balance, particularly at this stage. The plaintiffs' concern about the manner in which activities are offered would be better addressed as part of a broad monitoring scheme rather than transforming Dr. Perrien's proposal into a requirement for very detailed paperwork. Otherwise, the court would risk enmeshing itself in the operation of ADOC and overburdening the defendants.

On a practical level, the additional documentation would also not affect the proposed calculation of the "weekly provided out-of-cell time" for each unit, which is the "sum of [scheduled] activity hours minus program shutdown activity hours." Perrien Report (doc. no. 2772-1) at 3. Neither the number of persons who

participate in an activity nor the number of persons who refuse are factored into the number of scheduled activity hours or the number "program shutdown activity hours." Importantly, the plaintiffs do not disagree with this proposed method. See Pls.' Response (doc. no. 2805) at 2 ("The premise of Dr. Perrien's proposal is that celled housing units should adhere to out-of-cell time scheduled.... Plaintiffs agree with this concept."); *id.* at 3 ("Plaintiffs agree with Dr. Perrien that compliance with and deviation from the posted schedule should be documented with officers' signatures on the schedules, along with a written explanation for any deviation."); *id.* at 4 ("Plaintiffs agree with Dr. Perrien that out-of-cell time ... should be documented daily and calculated weekly").

Nonetheless, the court agrees with the plaintiffs' first concern that not all scheduled activities may be offered to all prisoners in a unit to the extent it is alternatively understood as a concern that the unit may not always be the right level of measurement for

identifying functional segregation. Instead, some units may be better tracked as separate tiers. Dr. Perrien's proposal, while sparse, does not suggest it would be appropriate to count time offered to one tier as time for the entire unit. Instead, it suggests that the scheduled activities are intended to be offered to each inmate. See Perrien Report (doc. no. 2772-1) at 3 ("It will not be necessary to track out-of-cell hours by inmate because the schedule's purpose is to provide sufficient hours for each inmate within the unit."). As a result, the court believes that a more practical way to accommodate the plaintiffs' concern would be to make explicit that scheduled activities in Dr. Perrien's proposal are required to be offered to each inmate and that, as a result, tracking tiers separately will be necessary when different tiers receive different access to out-of-cell activities.

Finally, Dr. Perrien also stated that, "To the extent that the schedule deviates from [the] goal of 11 or more hours of out-of-cell time per week, there may

need to be alternative or additional documentation." *Id.* at 3. This does not warrant a different outcome. First, the plaintiffs did not address Dr. Perrien's statement. Second, it is not clear what Dr. Perrien meant by the statement. In general, the court is concerned about any resulting uncertainty about the documentation of out-of-cell time, particularly in light of the parties' previous dispute about whether duty logs were a comprehensive source of out-of-cell time. See, e.g., Defs.' Notice (doc. no. 2772) at 4 ¶ 3 ("Plaintiffs offered nothing more than criticisms of the thoroughness of ADOC's documentation.").

#### B. Averaging of Out-of-Cell Time

Dr. Perrien proposes that the defendants average the amount of out-of-cell time each week "over the course of a quarter," Perrien Report (doc. no. 2772-1) at 3, such that there is a determination about whether or not a unit is functioning as segregation four times a year. In contrast, the plaintiffs propose averaging

the amount of out-of-cell time each week over the course of a month, such that there is instead a determination about whether a unit is functioning as segregation twelve times a year. See Pls.' Response (doc. no. 2805) at 4-5.

Dr. Perrien has offered no explanation for selecting quarters as her proposed period of measurement. Further, the plaintiffs have only pointed to the need to remove persons with serious mental illnesses (SMI) from segregation-like settings as soon as possible to justify the alternative monthly measure. See *id.* at 5. But this is only a partial justification, as the plaintiffs' requested relief is much broader than extending protections for SMIs. See *id.* at 10-11 (plaintiffs' request for relief).

### C. Counting of Out-of-Cell Activities

In prior testimony, plaintiff expert Dr. Burns explained that she would not count activities such as showers, haircuts, pill call, sick call, diabetic

finger sticks, the taking of vital signs, or the picking up of meal trays as out-of-cell time. See *Braggs*, 2019 WL 7041620, at \*2 (citing to the suicide-prevention trial). In contrast, the defendants' expert Dr. Perrien explained that she would count these activities, *if it were practical to do so*. See *id.* (emphasis added). Dr. Perrien's proposal, however, does not address whether or not it would be practical to do so. As a result, the plaintiffs ask this court to credit Dr. Burns' prior testimony and find that these brief activities "should not be counted," regardless of whether it is practical to do so. Pls.' Response (doc. no. 2805) at 7.

The plaintiffs, however, are *presuming* that the defendants believe it would be practical to count such activities and intend to do so. But the defendants did not comment on Dr. Perrien's proposal with such specificity as to know how they intend to implement it.

#### D. Nomination of Housing Units for Time-Tracking

The court solicited the above-discussed proposal from Dr. Perrien in order to determine whether a cell or unit should be covered by remedial orders related to ADOC's use of segregation. See generally *Braggs*, 2019 WL 7041620. The court thus intended for the proposal to be flexible enough to be applied during the duration of any relief ordered.

As the plaintiffs point out, "units within ADOC's major facilities frequently change purpose and use, and segregation-like units are created, moved, and eliminated at Defendants' sole discretion." Pls.' Response (doc. no. 2805) at 9. In anticipation of this, the plaintiffs ask this court to "permit them to request time-tracking of any additional units that Plaintiffs in good faith believe to be operating as segregation." *Id.*

Dr. Perrien's proposal, however, does not clearly address how the plaintiffs should nominate a unit for time-tracking. On the one hand, Dr. Perrien's proposal

explicitly "only addresses" those housing units alleged by the plaintiffs to function as segregation during the suicide-prevention trial. Perrien Report (doc. no. 2772-1) at 2. On the other hand, the proposal is also forward-looking, explaining that it generally "addresses a process to identify housing units that may function like restrictive housing units (RHUs) based upon limited out-of-cell time." *Id.* Relatedly, the proposal explains that "ADOC will develop a schedule for all Contested Units *with celled housing.*" *Id.* (emphasis added). Because the court understands that each of the units currently identified as "Contested Units" are celled housing, the additional language appears to contemplate future allegations about additional units. The proposal also specifies that it would apply only to celled housing units and not to either the mental-health units or "any cell or housing unit used for purposes of medical isolation/quarantine." *Id.* at 4.

Because the plaintiffs agree that the inquiry should be limited in this way,\* they suggest that "the universe of units that could be segregation-like is

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\* The plaintiffs agree with Dr. Perrien that the inquiry would be limited to celled housing units and will not apply to units already designated by ADOC as formal segregation. See Perrien Report (doc. no. 2772-1) at 4 (process "does not apply to any housing unit designated as a formal RHU"); Pls.' Response (doc. no. 2805) at 3 ("Plaintiffs agree ... that [process] should not apply to formally designated segregation"). The process would also not apply to mental-health units, which are already required to provide a minimum amount of out-of-cell time; units used for purposes of medical isolation/quarantine, at least as long as medical isolation does not become commonplace during COVID-19; and crisis cells, which will be subject to a different arrangement. See Perrien Report (doc. no. 2772-1) at 4 (process "does not apply to ... any housing unit for which ADOC may otherwise be required to provide a minimum of out-of-cell time, for example the Stabilization Units, Residential Treatment Units, or the Structured Living Unit," and, further, "inmates housed in crisis cells or medical cells/infirmery ... will be provided appropriate out of cell activity after 72 hours unless contraindicated"); Pls.' Response (doc. no. 2805) at 3-4 ("Plaintiffs agree ... that [process] should not apply to ... medical isolation/quarantine, stabilization, residential treatment, and structured living units"); *id.* at 3 n.5 ("Plaintiffs reserve the right to reassess whether medical isolation cells should be subject to segregation remedies if prolonged medical isolation becomes a more common practice within ADOC" given COVID-19); *id.* at 4 ("Plaintiffs agree ... that it is appropriate to provide out-of-cell time to people in crisis ... cells after 72 unless a clinical contraindication is documented").

relatively small." Pls.' Response (doc. no. 2805) at 12 n.10. The court, however, does not have a sufficient factual record to verify this.

#### E. Remedy

Dr. Perrien proposes that if a housing unit is considered functional segregation, then it "may become subject to some of the requirements applicable to [formal segregation] as determined on a unit-by-unit basis." Perrien Report (doc. no. 2772-1) at 3-4 (emphasis added). However, "many of the ... requirements might not be applicable to certain types of housing units or cells." *Id.* at 4 n.2. Ultimately, the "ADOC, with input from the External Compliance Team," would "determine which requirements might be appropriate on a unit-by-unit basis." *Id.*

Because "there is currently no External Compliance Team ... in place," the plaintiffs "request that any unit-by-unit exceptions be approved by Dr. Perrien and

... Dr. Kathryn Burns." Pls.' Response (doc. no. 2805) at 4.

But the plaintiffs also "ask the Court to order relief for segregation-like units that is consistent with relief that has already been ordered for officially designated segregation units ... and ... re-assert their request for additional segregation relief that remains pending before the Court." *Id.* at 11.

It is not exactly clear to the court how the plaintiffs' multiple requests are compatible with one another or what would constitute "consistent" relief.

Further, the court is concerned though that not all remedial relief for segregation already ordered or pending before the court would be appropriate for all segregation-like units, primarily because such units can change their status over time, transforming from functional segregation in one month or quarter to providing enough out-of-cell time the next month or quarter.

Finally, the court is also cognizant about the different nature of the evidence presented during the liability trial as to formal and functional segregation. During the liability trial, this court reviewed evidence on the "risks of decompensation created by segregation in general and by ADOC's segregation units in particular." *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1240 (M.D. Ala. 2017) (Thompson, J.) (emphasis added). The risks of decompensation by segregation in general would apply to both formal and functional segregation because the risks flow from the shared lack of out-of-cell time. But the risks of decompensation by ADOC's segregation units in particular may only be directly relevant to formal segregation.

## II. DEFENDANTS' OBJECTIONS TO RELIEF

In general, the defendants object to extending any relief to units functioning as segregation, regardless of the ultimate process for tracking out-of-cell time.

The defendants offer five arguments, none of which are persuasive: (1) the lack of evidence in the suicide-prevention trial; (2) the lack of a "current, ongoing constitutional violation"; (3) the "justified reasons for limiting inmates' out-of-cell time"; (4) the fact that the plaintiffs "cannot rewrite the remedial stipulations and orders regarding restrictive housing"; and (5) the "conflict[] with the PLRA's need-narrowness-intrusiveness requirements," because of the lack of a liability finding. *Id.* at 3 ¶ 2.

The defendants' first two claims are both related to the evidence presented at the suicide-prevention trial. First, the defendants claim that "[t]he evidence before the Court *disproved* Plaintiffs' allegations concerning the allegedly 'segregation-like' settings." Defs.' Notice (doc. no. 2772) at 3 ¶ 2.a, 3 ¶ 3 (emphasis added). Second, the defendants claim that the plaintiffs "fail to show a current, ongoing constitutional violation" because "the record contains no evidence regarding the *current* use or conditions

within the Contested Units." *Id.* at 3 ¶ 2.b, 4 ¶ 4 (emphasis added). But both related arguments misconceive the role of the evidence previously presented. During the suicide-prevention trial "both experts ... jointly recommended that the court extend certain relief to units functioning as segregation, even if not formally labelled as such." *Braggs*, 2019 WL 7041620, at \*1. The evidence presented thus provided the foundation for further inquiry into precisely how to best determine when and where units are *currently* operating as functional segregation. In fact, when the court solicited Dr. Perrien's proposal, it explained that it was "interested in a methodological proposal for how to determine which cells or units function as segregation, *not an evaluation of the specific evidence presented during the suicide-prevention trial.*" *Braggs*, 2019 WL 7041620, at \*2 (emphasis added). Because the determination of whether or not a unit is functioning as segregation will be based on the time-tracking

method proposed by Dr. Perrien, the defendants' argument about the evidence or lack of evidence presented during the suicide-prevention trial is not a basis for denying all relief.

The defendants' third, fourth, and fifth claims all relate to the potential relief. The defendants' third claim is that that any relief would be "overly broad" because it would "ignore the necessary, justified reasons for limiting inmates' out-of-cell time," such as when an inmate is "placed on suicide watch or other crisis placement" or is "subject to restrictions and observation by members of the medical staff." *Id.* at 3 ¶ 2.c, 5 ¶ 5. Fourth, the defendants claim that applying "the remedial stipulations and orders regarding restrictive housing" to segregation-like settings would be inappropriate because the defendants "never agreed that the ... [s]tipulations applied to the Contested Units or any other allegedly 'segregation-like' setting." *Id.* at 3 ¶ 2.e, 6–7 ¶ 7. Fifth, the defendants claim that "[t]he relief sought

by the Plaintiffs related to the Contested Units conflicts with the PLRA's need-narrowness-intrusiveness requirements" because "the Court made no liability finding with respect to the Contested Units." *Id.* at 3 ¶ 2.d, 6 ¶ 6.

Both the third and fourth claims are now moot. Both Dr. Perrien and the plaintiffs have agreed that cells or units used for suicide watch, crisis placement, or medical isolation will *not* be considered functional segregation, regardless of the lack of out-of-cell time, for the reasons cited by the defendants. See *supra* note \*. Further, the plaintiffs have clarified that "[t]he stipulated segregation remedies apply only to units ADOC has officially designated as segregation units" and that they "do not now seek to undermine [the remedial stipulations] by asking that they be read to include segregation-like units." Pls.' Response (doc. no. 2805) at 10 & n.8. Instead, the plaintiffs "ask the [c]ourt to order relief for segregation-like units that

is consistent with relief that has already been ordered for officially designated segregation units" and "re-assert their request for additional segregation relief that remains pending before the [c]ourt... which should apply to both segregation and segregation-like units." *Id.* at 11. As a result, the defendants' concerns, as reflected in their third and fourth arguments, are adequately addressed and are not a basis for denying relief.

The flaw with the defendants' fifth claim related to the PLRA is that it misconceives the nature of the violation found in the liability opinion. This court found that one of the factors contributing to the Eighth Amendment violation was the State's use of segregation, including "[p]lacing seriously mentally ill prisoners in segregation without extenuating circumstances and for prolonged periods of time; placing prisoners with serious mental-health needs in segregation without adequate consideration of the impact of segregation on mental health; and providing

inadequate treatment and monitoring in segregation.”

*Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1268 ¶ 7 (M.D. Ala. 2017) (Thompson, J.). It is true that the appropriate relief for units functioning as segregation may be different than for units formally designated as segregation, because the violation found in the liability opinion stemmed from both the general lack of out-of-cell time and the particular conditions of formal segregation units. Nonetheless, “[t]he court heard significant evidence that extended segregation—even absent consideration of the conditions at ADOC—poses a substantial risk of harm to all mentally ill prisoners.” *Id.* at 1245 (emphasis added). The court cannot be at the mercy of defendants’ nomenclature as to what is and what is not segregation. As a result, determining whether units function as segregation—based on the limited amount of out-of-cell time provided—is necessary to remedying one of the factors that contributed to the Eighth Amendment violation. Nonetheless, the court will consider the extent of

appropriate relief in light of both its liability finding and the PLRA.

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Accordingly, it is ORDERED as follows:

(1) As to the documentation of out-of-cell time, the court needs the following additional information:

(a) Dr. Perrien is to clarify whether the "provided activity hours" are actually the scheduled activity hours and whether the "program shutdown activity hours" are the hours for which an activity was scheduled but did not occur. Perrien Proposal (doc. no. 2772-1) at 1. The court believes it would benefit from an example.

(b) Dr. Perrien is to address additionally (1) whether scheduled activities are required to be offered to each inmate and (2) whether, as a result, tracking tiers separately will be necessary when different tiers receive

different access to out-of-cell activities. If scheduled activities are not required to be offered to each inmate, Dr. Perrien is to also address (3) how such a system will ensure that there are "sufficient [out-of-cell] hours for each inmate within the unit." *Id.* at 1. Again, the court believes it would benefit from an example of a possible schedule.

(c) Dr. Perrien is to finally clarify what she meant by the statement that, "To the extent that the schedule deviates from [the] goal of 11 or more hours of out-of-cell time per week, there may need to be alternative or additional documentation," *id.* at 3, in light of the parties' previous dispute about whether duty logs were a comprehensive source of out-of-cell time.

(d) The defendants may address Dr. Perrien's response in their commentary. The plaintiffs need not address this issue further.

(2) As to the averaging of out-of-cell time, the court needs the following additional information:

(a) Dr. Perrien is to explain the basis for her decision to use a quarterly measure.

(b) The plaintiffs are to explain the basis for their decision to propose a monthly measure, beyond the basis already provided.

(c) Both Dr. Perrien and the plaintiffs are also to address whether a monthly measure may be appropriate for enforcing protections for SMIs while a quarterly measure may be appropriate for other forms of relief.

(d) The defendants may also address this in their commentary.

(e) Finally, the defendants are to explain whether they agree or disagree with the plaintiffs' proposal that (1) a warden should be responsible for calculating the average amount of out-of-cell time and that (2) these

numbers should be provided to plaintiffs within a specified period of time.

(3) As to the counting of out-of-cell activities, the court needs the following additional information:

(a) The defendants are to explain whether they intend to schedule showers, haircuts, pill call, sick call, diabetic finger sticks, the taking of vital signs, or the picking up of meal trays as out-of-cell time when implementing Dr. Perrien's proposal.

(b) If the defendants do intend to schedule any of these activities as out-of-cell time, the defendants are to additionally explain precisely how they will implement Dr. Perrien's proposal and fulfill its purpose of "provid[ing] sufficient [out-of-cell] hours for each inmate within the unit," Perrien Proposal (doc. no. 2772-1) at 3, particularly if the activities will not be offered to every inmate.

For example, while showers presumably are offered to each inmate, diabetic finger sticks are not. The court believes it would benefit from an example about the out-of-cell activities that the defendants intend to schedule.

(4) As to the nomination of future units for time-tracking, the court needs the following additional information:

(a) Dr. Perrien is to address the plaintiffs' counter-proposal.

(b) If Dr. Perrien does not agree with the plaintiffs' counter-proposal, Dr. Perrien is to additionally propose an alternative method by which the plaintiffs will be able to nominate additional units for future time-tracking.

(c) Further, in order to evaluate the scope of the plaintiffs' counter-proposal, the defendants are to supply this court with information on the universe of celled housing

units which are not officially designated as restrictive housing units, residential treatment units, stabilization units, or structured living units, including the number of such units; the number of cells in such units; and, for comparison purposes, the number of total units and number of total cells across ADOC's major facilities. The defendants may choose to rely on information previously gathered as part the Savages' staffing analysis, if relevant.

(d) The defendants may also address the plaintiffs' counter-proposal or Dr. Perrien's response in their commentary.

(e) The plaintiffs need not address this issue further.

(5) As to the remedy, the court needs the following additional information:

(a) The plaintiffs are to address how the request that "any unit-by-unit exceptions be

approved by Dr. Perrien ... and Dr. Kathryn Burns," Pls.' Response (doc. no. 2805) at 4, is compatible with their "[ask]ing the Court to order relief for segregation-like units that is consistent with relief that has already been ordered for officially designated segregation units ... and ... re-assert[ing] their request for additional segregation relief that remains pending before the Court." *Id.* at 11. The plaintiffs are to additionally clarify what would constitute "consistent" relief.

- (b) The plaintiffs are also to address why each aspect of the relief that has either already been stipulated to for formal segregation units or that remains pending before the court for the segregation opinion under submission is appropriate for units found to be functioning as segregation, in light of two factors: (1) segregation-like units can, by definition, change their status over time,

transforming from functional segregation in one month or quarter to providing enough out-of-cell time the next month or quarter; and (2) while the court made findings in its liability opinion about the risks of decompensation created by both the practice of segregation in general and ADOC's formal segregation units in particular, only the former may be relevant here. The court is particularly interested in whether each aspect of the requested relief is justified in light of these facts and whether some forms of relief should be prioritized over others, such as enforcing protections for SMIs or implementing security checks.

(c) The defendants may address this in their commentary.

(6) The defendants are to file with the court, by noon on July 13, 2020, a response by Dr. Perrien to the portion of court's order directed towards her,

along with any commentary the defendants deem appropriate.

(7) The defendants are to additionally file with the court, by noon on July 13, 2020, a response to the portion of the court's order directed towards them. The defendants may include these responses along with their commentary or separate from their commentary, whichever they prefer.

(8) The plaintiffs are to file with the court, by noon on July 13, 2020, a response to the portion of court's order directed towards them.

(9) If the court desires any counter-responses, the court will let the parties know at a later date.

DONE, this the 1st day of June, 2020.

/s/ Myron H. Thompson  
UNITED STATES DISTRICT JUDGE